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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 302

THOMAS J. HYLAND, THEODORE N. SCHMIDT, CHARLES A. ROSS, EMERSON LEE McCONNELL, STEVE GEORGE TOMASKO, ORA E. O'BRIEN, and FEDERAL EMPLOYEES EQUALITY ASSOCIATION,

Petitioners,

v.

ROBERT WATSON, BERTRAM M. ROSE, GENERAL E. W. RAWLINGS, and BRIG. GEN. STANLEY T. WRAY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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ROBERT WATSON, BERTRAM M. ROSE, GENERAL E. W. RAWLINGS, and BRIG. GEN. STANLEY T. WRAY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Thomas J. Hyland, Theodore N. Schmidt, Charles A. Ross, Emerson Lee McConnell, Steve George Tomasko, Ora E. O'Brien, and Federal Employees Equality Association, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on February 10, 1961.

CITATIONS TO OPINIONS BELOW

The official report of the opinion delivered in the Court below is contained in 287 F. 2d 884. The decision of the Court on the Petition for Rehearing and the District Court Order are unreported. The District Court Order appears at page 48a of the record (nine copies filed with this Court pursuant to paragraph 4 of Rule 21). The decision of the Court of Appeals on the Petition for Rehearing, as well as the decision of February 10, 1961, are appended hereto.

JURISDICTION

The judgment of the Court of Appeals was entered February 10, 1961. A Petition for Rehearing was denied April 13, 1961. An extension of time until August 10, 1961, for filing a Petition for Certiorari was granted by this Court on July 12, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. (a) When a Federal statute (Veterans Preference Law) is applied to Ohio residents employed by the Federal government in a manner similar to that in which a decision of the State Court has ruled a Union's monopoly was unconstitutional, is there a substantial constitutional question requiring a three judge Court under 28 U. S. C. 2282, 2284?

(b) Did the District Judge commit reversible error by refusing to summon a Three-Judge Court and dismissing a suit instituted by Federal employees to have the Veterans Preference Act of 1944 declared unconstitutional and to enjoin the enforcement and operation of said Act?

2. Is Section Twelve of the Veterans Preference Act of 1944 unconstitutional in that it violates the due process clause of the Fifth Amendment to the Constitution of the United States by arbitrarily preventing non-veterans from continuing their Government employment?

3. Does the control over removals from office of Federal employees exerted by operation of the Veterans Preference Law violate the doctrine of separation of powers?

4. Is the Veterans Preference Act of 1944 ex post facto and in violation of Article I, Section 9, Clause 3 of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Veterans Preference Act of 1944, Section 12 (5 U. S. C. 861, 58 Stat. 390, Act of June 27, 1944) is set forth on page 50a of the record of the Court below.

The Preamble to the Constitution:

> We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The Fifth Amendment (emphasis supplied):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation

Article I, Section 9, Clause 3:

> "No Bill of Attainder or ex post facto Law shall be passed."

STATEMENT OF THE CASE

This action was brought as a class action by individual civilian employees of Wright Patterson Air Force Base, Ohio, and as an association for the benefit of its members. The Association, The Federal Employees Equality Association, was organized in March, 1957, as the direct result of a reduction-in-force at Wright Patterson Air Force Base, and directly resulting from the activities of certain non-veteran civilian employees of the Government who believed that they were being deprived of their Constitutional rights. In the Fall of 1957, particularly during the month of September, a more serious reduction in force struck many of the employees of the Air Field, resulting in many reduction-in-force notices being issued, some for separation from the Field and some for reduction in grade and pay. Suit was filed in the District Court at Dayton on October 4, 1957, challenging the constitutionality of the Veterans' Preference Law (Record, 50a). This Act purports to *require* all veteran employees of the Government with an efficiency rating of good to be retained in employment, during reductions in force, in preference to non-veteran employees in the same job (competitive level).

The challenge is made that the law is unconstitutional in that it is repugnant to the Preamble and Bill of Rights of the Constitution of the United States, as well as the Fifth Amendment of the Constitution, and repugnant to the doctrine of Separations of Powers (Record, 10a).

This case is not to be construed as contesting or challenging all benefits to veterans; on the contrary, the case is specifically directed to and challenges the constitutionality of a specific Act of Congress, Section 2 and Section 12 of the Act of June 27, 1944, as amended, 5 U. S. Code, Sec. 851; 861; it is this Act that requires mandatory retention of veterans as against non-veterans.

Section 2 of the Act defines a veteran as anyone who has been honorably discharged after one (1) or more days of active duty in any branch of the armed services during a time of war.

This action arose in the District Court under the federal question jurisdiction of the Federal Courts. 28 U. S. C., Sec. 1331.

The complaint sets forth six individual plaintiffs in addition to The Federal Employees Equality Association. The plaintiffs are all civilian employees of the United States Government, or were at the time the action was filed; each plaintiff is a non-veteran. The complaint alleges that each of the plaintiffs have had at least "satisfactory" efficiency ratings and that each was being separated or reduced in grade as a direct result of the application of the Veterans Preference Law during a reduction-in-force (Record, 2a-8a).

Defendants are two Personnel Chiefs at the two principal commands at Wright Patterson Air Force Base, Ohio, i.e. Robert Watson for Air Materiel Command and Bertram M. Rose, for Wright Air Development Center. Also named as defendants were General Rawlings and General Wray, who were the respective commanders of the Air Materiel Command and Wright Air Development Center, at the time the suit was filed (Record, 2a-4a).

Petitioners alleged in paragraph 13 of their complaint that Plaintiffs Hyland, Schmidt and Tomasko "could and would have become members of the Armed Forces of the United States and could and would have become entitled to Veterans' status, except for action by the United States Government. Defendants or their predecessors prevented said plaintiffs' acquisition of such status by requesting and obtaining draft deferments, in pursuance of which said plaintiffs were prevented from leaving civilian employment with the United States Government." (Record, page 8a.)

Plaintiff Ross received an occupational deferment at Government request and was taken prisoner by the Japanese Army soon thereafter; Petitioners were therefore prohibited from becoming members of the armed forces under specific executive orders of the President. (Executive Orders, 8561, 9309—pertinent text reproduced in Appendix.)

An application for a Three-Judge District Court was filed, pursuant to Sections 2282, 2284, Title 28, United States Code (Record, 13a-14a). Respondents filed their Amended Motion to Dismiss on the grounds of no substantial constitutional question and that the complaint failed to state a claim upon which relief could be granted (Record, 15a).

Depositions of the Personnel Chiefs, Mr. Watson and Mr. Rose, and two of the individual plaintiffs, Mr. Charles Ross (also, Mrs. Ross) and Mr. Emerson Lee McConnell, were filed with the Court in support of Petitioners' application for a Three-Judge District Court. A stipulation of counsel was also before the District Court (Record, 44a-47a).

A reading of the depositions of Mr. Rose, Mr. and Mrs. Ross, and Mr. McConnell are vitally essential to an understanding of this case (Record, 16a-43a).

Petitioners respectfully call to the Court's attention the testimony of Mr. Rose, the Personnel Chief, who explained the reduction-in-force procedure (Record, 16a-17a). Cross-examination of Mr. Rose brought out the singular importance of Veterans Preference in that less than one-half of one percent of employees showed an outstanding performance rating and that virtually all wage board employees fall in a "satisfactory" category (Record, 19a). Regardless of the number of years of satisfactory service, non-veterans are categorized in a separate class from veterans (Record, 20a).

A veteran is anyone receiving an honorable discharge; no overseas duty, no battle experience, *no minimum length of active duty is required* (Record, 21a).

Plaintiffs, as government employees, are part of the Executive Branch of the United States Government (Record, 22a). Mr. Ross' work as a sheetmetal worker is conceded to be a trade, taking training and experience to learn (Record, 23a).

Mr. Ross testified as to his experiences in a manner that is most interesting reading. Petitioners urge the Court to note the following (Record, 29a-31a):

> Q. Tell us what happened after you arrived in the Philippine Islands?
>
> A. We arrived in the Philippines on the first Thanksgiving that Roosevelt pushed Thanksgiving up a week, which was the 20th of November, I think, that year. We reported to the Field that day and were assigned to our different organizations, and I was assigned to the Aircraft Sheet Metal Shop, and then it was in a week I was put in charge of the Aircraft Sheet Metal Shop.
>
> Q. What was the war situation then?
>
> A. It was tense. They had been on the alert since the first of August of that year.
>
> Q. In 1941?
>
> A. In 1941, yes sir. The Japanese fleet had been lying out off the coast of Lingayen Gulf, and they had been on maneuvers for quite some time prior to August 1st, and there had been activity in the Pacific. This is a statement made by a navigator, by the name of Nicholson, who flew PBY's over in August, and at that time there was sighted between North Guam and Honolulu sixteen Jap submarines on a rendezvous. That was told to us by civil service employees and merchant marine, so we maintained and repaired American aircraft and fighter planes until they hit us.
>
> • • • • •

> A. Well, we will start at the time the war was declared, which would be the 8th of December. We got it a day before you because we are a day ahead of you out there. We were put on a twenty-four-hour alert and we worked constantly as much as we could on the Field, in blackout at night, and through the daytime, repairing our aircraft and moving all major equipment and supplies. We were constantly under bombardment starting at eleven until five in the evening.

A comparison of the activities of Mr. Ross (non-veteran) and Mr. Daryl George (nine (9) day veteran) can be shown by paraphrasing the stipulation (Record, 44a) and Mr. Ross' deposition (Record, 29a-42a). See the comparison chart in Appendix.

After the depositions were filed and the case submitted, District Judge Carl A. Weinman sustained the Government's motion to dismiss and refused to convene a Three-Judge District Court (Record, 48a). The Court of Appeals affirmed and denied a Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

Never before has a case been more worthy of granting certiorari! Legally, morally, politically, socially, and philosophically, the Veterans Preference Act, as it is now written, cannot stand as a valid enactment. The broad base of law in this great country is the Constitution itself. It is fundamental that human equality was the doctrinal basis for *Brown* v. *Board of Education*, 347 U. S. 483, on May 17, 1954, and subsequent integration decisions. See "*An American Dilemma*" (1944) by Karl Gunnar Myrdal, cited by this Court as "modern authority" for the *Brown* decision, wherein the author defined the doctrine of human equality as "the highest law of the land," on page 9, and on page 14, "The philosophy that all men are created equal" is "the American creed."

President Kennedy has placed emphasis on equal opportunity for Federal employment. Within the President's own Executive Branch, however, the Congress has placed a law which *prevents* equal opportunity. The Petitioners in this action are concerned, unselfishly, for future generations of Government employees, the general efficiency of the Government service, and in blunt language "how this inroad into basic American jurisprudence, passed at the end of World War II for the purpose of rehabilitation of the returning Veteran, can continue to be a valid law this many years after the purpose for which it was enacted has long since elapsed." In short, Petitioners believe that this law is destroying one of the basic freedoms for which this country fought for its independence and has fought since to preserve that independence—the right to follow one's chosen trade, without DISCRIMINATION, without being classified as 1A or 1B, said classification being arbitrary and based upon facts and circumstances over which the second class citizen had no control nor say-so. Draft deferments, in pursuance of which Petitioners were prevented from leaving civilian employment with the United States Government, were requested by and had to be requested *by the Government. Executive Orders* 8561, 9309, Appendix, p. 6a.

This case was destined to appear in this Court. The Trial Court and the Court of Appeals were reluctant to not follow the *White* case. *White, et al.* v. *Gates, et al.*, 253 F. 2d 868, certiorari denied, 356 U. S. 973. The facts of the *White* case, however, were virtually moot, even before the matter was filed in the District Court. See excerpts from stipulations and affidavits, appended hereto, p. 4a.

The members of this Court will recall Paul V. McNutt and his statements to the effect that it takes the "home front" to keep the tanks and machine-guns and aircraft and materials and supplies going to the front lines. The

War Manpower Commission authorized deferments in large numbers. Petitioners herein represent the "home front" that helped to win the war. And some, in fact, many of the Petitioners herein, were not home. They were in the Philippines or Hawaii or Alaska.

In the language of the *Mitchell* decision (*Mitchell* v. *Cohen*, 333 U. S. 411), Petitioners herein were closer to being full fledged soldiers than many state-side "veterans." Specifically, no one can dispute that Petitioner Ross is truly a veteran out of uniform. The Dayton Journal Herald aptly stated that newspaper's stand in an editorial printed after the Court of Appeals decision. Appendix, p. 8a.

Relevant to show that the Veterans Preference Act is no longer serving a *public* purpose, for the benefit of the public as a whole are the following quotations from investigations conducted.

The Senate Post Office and Civil Service Committee, after an exhaustive study of the effect of the Veterans Preference Act of 1944, reported:

> "The result is that Government is gradually losing many of its most experienced and highly skilled employees. Moreover, arsenals, ordnance laboratories and plants, and navy yards report that they cannot recruit skilled men for these positions, and former employees who have been laid off in reductions, will not return to Government employment as a consequence of this basic inequity in competing for retention."
>
> Reduction-In-Force System in the Federal Government, Senate Report No. 2102, 82d Congress, 2d Session, p. 24 (1953A)

As was stated in the Task Force Report of the Hoover Commission, at page 114:

> "The rigidities of the Veterans Preference Act have proved especially trying in the successive reductions

in force of the post-war years. The preference for the veteran group in these reductions has resulted in endless and costly 'red tape' which is unavoidable in administering these provisions, and also has interfered with the basic management authority to control the quality of staff employed. When a reduction in force begins, no supervisor can tell where it will end or what employees will be bumped down or out. The effect on employee morale is depressing."

The American Assembly has said:

"Unquestionably the most serious current problem of preference arises from the procedure for Federal reductions in force. The resulting upsets have gone to the very fabric of agency organization and morale. It is doubtful that many private organizations have endured and survived such internal convulsions. . . . (The upsets) have shaken the morale and the feeling of security of thousands of other employees and the interest and faith in the government as employer among many thousands outside the government. Some of the best public servants have been fired or 'bumped'; many others have voluntarily left the service; perhaps many thousands of others have been discouraged from seeking Federal employment. This situation has led the National Civil Service League to label veterans' preference as 'perhaps the most serious obstacle in the way of efficient managing of Federal personnel today.'"

The American Assembly, The Federal Government Service, p. 139.

QUESTION 1. (a)

WHEN A FEDERAL STATUTE (VETERANS PREFERENCE LAW) IS APPLIED TO OHIO RESIDENTS EMPLOYED BY THE FEDERAL GOVERNMENT IN A MANNER SIMILAR TO THAT IN WHICH A DECISION OF THE STATE COURT HAS RULED A UNION'S MONOPOLY WAS UNCONSTITU-

TIONAL, IS THERE A SUBSTANTIAL QUESTION REQUIRING A THREE JUDGE COURT UNDER 28 U. S. C. 2282, 2284?

In the case of *Seligman* v. *The Toledo Motion Pictures*, 88 Ohio App. 137 (1947), the Court stated in the fourth syllabus:

> "The right to labor, to follow a chosen trade or occupation, and to earn a livelihood for oneself and those dependent on him, is a property right within the benign protection of the bill of rights of the Ohio Constitution, and of the Constitution of the United States, and the invasion of that right is a legal wrong for which the law provides a remedy.
>
> "In the instant case, the action taken by the local union, depriving plaintiff of his right to work and have employment in the field where he is trained and learned through years of labor, is arbitrary, unreasonable, violative of plaintiff's constitutional rights and contrary to public policy."

It is well to point out that the usual rule that constitutionality is presumed does not apply when we are dealing with the individual's basic rights. 16 *Corpus. Juris. Secundum*, Constitutional Law, Sec. 99, p. 442 states,

> "On the other hand, where rights, privileges, and immunities of the citizen are involved, the usual strong presumption in favor of constitutionality does not apply." *Ex parte Mitsuye Endo*, 323 U. S. 283.

Throughout the *Mitchell* opinion, supra, this Court discussed the true purpose of the Veterans' Preference Act as being to compensate the "full fledged soldier."

Petitioners ask the question, "How does one become a full fledged soldier with nine days of military service?" Petitioner McConnell complains that he was reduced from a wage foreman to a wage leader, losing both wages and

the foreman title and that one, Daryl George, with less service was not reduced from the grade of foreman (Record, 26a-37a). Mr. George was in the Armed Services of the United States from March 16, 1944, to March 25, 1944, at which time he received an honorable discharge from the U. S. Navy for medical reasons, yet Mr. George has veterans' preference which has withstood appeal to the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. (Record, 45a).

It is apparent, therefore that the Court-made definition of the *Mitchell* case has not been applied. Or does the Government contend that Mr. George was a "full fledged sailor?"

Petitioners submit that a substantial constitutional question exists. The decision of the Court of Appeals is not harmonious with the *Seligman* case which correctly states the applicable law.

QUESTION 1. (b)

DID THE DISTRICT JUDGE COMMIT REVERSIBLE ERROR, BY REFUSING TO SUMMON A THREE-JUDGE COURT AND DISMISSING A SUIT INSTITUTED BY FEDERAL EMPLOYEES TO HAVE THE VETERANS PREFERENCE ACT OF 1944 DECLARED UNCONSTITUTIONAL AND TO ENJOIN THE ENFORCEMENT AND OPERATION OF SAID ACT?

At what point does the District Court differentiate between "no substantial constitutional question" and "a constitutional question presented but Plaintiffs should not prevail." Petitioners submit that it was not the intention of Congress in enacting these Sections that Plaintiffs should have this burden thrown upon them to establish beyond the shadow of a doubt that a "substantial" constitutional question presents itself, but rather, that it is the duty of the District Judge to convene a Three-Judge Court

if the attack on the constitutionality of a Federal Statute is bona fide and not frivolous, and is not obviously without merit nor that its unsoundness clearly results from previous decisions of the Supreme Court.

See 27 *University of Chicago Law Review* (1960) 555, 560, wherein the author states, in regard to refusal to convene a Three-Judge Court:

> "Such a finding usually amounts to an adjudication on the merits."

The author cites *Ex parte Poresky,* 290 U. S. 30 (1933), as an example. But there the District Judge had a ruling of the Supreme Court upholding the law under attack.

The case of *California Water Service Co.* v. *Redding,* 304 U. S. 252, held that the question there involved was a local one and, further, that the cause of action was without merit because of two other decisions *of the United States Supreme Court.*

The question of the constitutionality of the Veterans Preference Law has NEVER been decided by the Supreme Court of the United States. The denial of the writ of certiorari in the *White* decision is not a ruling on the merits as this Court has many times stated. The *Hilton* decision was not a ruling on the constitutionality question. *Hilton* v. *Sullivan,* 334 U. S. 323 (1948).

Petitioners submit that the constitutional challenges in this case are so meritorious—so *obviously* substantial—that to close the door on this attack on this arbitrary law is opening the door for Communism to step in. For when one presents before this Court the logical, legal, heart-warming, touching, tragic story of Mr. Charles Ross, representing the thousands of non-veterans still in the Government employ, to say that his challenge to this inroad into his basic civil rights is "obviously without merit" would be a travesty on justice to the fullest extent. This case,

affecting three million Government employees, with the backing of the Hoover Commission, the President's Commission on Pensions, the American Assembly, and other sources cited herein is so important now and continuously whenever there is a reduction-in-force in any Military base throughout the United States and its possessions—so important to the public as a whole (efficiency in the public service) and so important to the individual (right to equal opportunity to pursue his trade uninterrupted)—so important that this case stands at the opposite end of the room from "unsubstantial" attacks on Federal Statutes.

An example of an unsubstantial attack would be the case of *Carrigan* v. *Sunland-Tugunga Telephone Company*, 263 Fed. 2d 568 (C. C. A. 9th, 1959), certiorari denied, 79 S. Ct. 893, wherein Plaintiff prayed for a gross refund of $20.76 for 1957, a net refund of $1.44 for a portion of 1958 and for restoration of her telephone service (disconnected after Plaintiff had failed to pay the charges therefor). The Court stated, at page 571, "No facts are alleged to show any monetary damage in excess of $50.00, or thereabouts."

Petitioners submit that this case demonstrates by contrast what is meant when this Court has said there must be a substantial Federal question. *But Mrs. Carrigan and Mr. Ross are not in the same league.* Neither is Mr. Otten. *Otten* v. *Baltimore & Ohio R. Co.*, 205 Fed. 2d 58 (C. C. A. 2d, 1953). (Otten, a member of "Plymouth Brethren IV" refused to join a union because his religious scruples forbade his becoming a member of any organization composed in any part of "unbelievers.") The one other case cited by the *White* decision as an authority for not convening a Three-Judge Court, *Wicks* v. *Southern Pacific Co.*, 231 Fed. 2d 130 (C. C. A. 9th, 1956), falls in the same category as Mr. Otten. The Court in the *Wicks* decision stated, at page 136, "The facts and legal issues in *Otten* practically duplicate these in the cases at bar."

Petitioners have not refused to join a union shop, nor have they had their telephone service disconnected—THEY HAVE LOST THEIR JOBS—because of an arbitrary and capricious law pushed through by the strong veterans lobby immediately following World War II.

Even the *White* decision is authority that a substantial constitutional question exists for Judge Prettyman stated.

> "*I think a substantial constitutional question is raised.* I would remand for consideration by a statutory Three-Judge District Court." (Emphasis supplied.)

The President's Commission on Veterans' Pensions has, after a thorough study of the problem of the obligations of the government to veterans of the military services concluded:

> "Preference in retention during reductions in force for non-disabled veterans has no real relation to readjustment needs and does violence to the basic principles of the Federal merit system. The goals of open competition and equal treatment for all, on the basis of their ability to serve the public as employees, cannot be achieved if there is *arbitrary discrimination* in favor of one group based on factors having nothing to do either with their efficiency or with their readjustment needs as veterans." (Emphasis supplied.)
>
> Veterans Benefits in the United States (1956) p. 318.

QUESTION 2.

IS SECTION TWELVE OF THE VETERANS PREFERENCE ACT OF 1944 UNCONSTITUTIONAL IN THAT IT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY ARBITRARILY PREVENTING NON-VETERANS FROM CONTINUING THEIR GOVERNMENT EMPLOYMENT?

A statute may sound acceptable, historically, but be unconstitutional in its application. Such is the Veterans Preference Act. It might appear, on the surface, that a *preference* to combat veterans is proper. On taking a long serious look into the workings of the Act, under attack, however, one finds that, in practice, what is denominated a preference is, in reality, a *mandatory* requirement that even President Kennedy could not alter in his Executive Branch.

Although the Veterans Preference Law purports to bring into consideration the qualifications of the individual by requiring a satisfactory performance rating, it is to be noted that less than one half of one per cent of employees showed an outstanding performance rating, resulting in virtually *all* employees falling in the satisfactory category (Record, 19a). Note also that regardless of the number of years of satisfactory service, the career non-veteran *can never* be classified with the career veteran (Record, 20a).

The retention register, then, for the purposes of this case, reduces itself down to an arbitrary listing of employees—not by longevity nor by qualification for the job—but by veteran or non-veteran. This argument can be more readily seen by the following example:

THEORY	IN PRACTICE
1. Longevity	~~1. Longevity~~
2. Efficiency (qualification)	~~2. Efficiency (qualification)~~
3. Veterans Preference	3. Veterans Preference

The reason for lining out longevity is that, as between veterans and non-veterans, the number of years of service do not enter in. This is inherent in the classifications of A and B. The reason for lining out efficiency (qualifications) is that virtually all employees who are continuing on the payroll are in the satisfactory category. In fact, unsatisfactory employees are separated from the federal

service, as they should be if they are not satisfactory. 5 U. S. C. Sec. 2005.

From the above discussion, it is apparent that a non-veteran employee of many years of efficient service *must* be separated ahead of *any* career veteran on the same job.

A person's business, occupation, or calling is "property" within the meaning of the constitutional provisions as to due process of law, and is included in the right to liberty and the pursuit of happiness. 11 *Amer. Jur.* 1148.

There is no question but what the Bill of Rights of the Constitutions of Ohio and of the United States protects an individual's right to work and to follow a chosen trade or occupation.

It is essential that one realizes the important significance of this point. If it were possible, petitioners would suggest that the individual members of this Court "view the premises." If one could see the "stat" room where the "statistical runs" of retention registers take place, then perhaps appellants could bring home the full impact of the Veterans' Preference Law. For it is at the Government installations, such as Wright Patterson Air Force Base, that a Government employee of many years of service receives his "notice of personnel action" after a "stat run." The non-veteran has a good idea what is in the envelope before he opens it. He knows, for example, that there has been ordered a reduction-in-force; that despite his sixteen years of service (or what have you), that he is near the bottom of the retention register. He knows this because he can look around and determine how many "non-vets" are left. He need not consider the years of service of the veterans on his job nor how efficient or inefficient the veterans may have been doing their job. For the non-veteran *knows* that the retention register after it has come from the statistical run is a listing and that the listing is not primarily by years of service, nor efficiency—the listing

is primarily class A and class B (veteran and non-veteran). The "non-vet" knows that the Civil Service System is no longer a true merit system for, in practice, the reduction-in-force system reduces itself down to: "*VETERANS' PREFERENCE.*

The "non-vet" reads his "notice of personnel action" and wonders how the Government (*his* Government) can do this to him. For words cannot tell the penalty thus inflicted. It is just as though the personnel records of Mr. McConnell and Mr. Ross had been stamped in huge red letters "*NON-VET.*"

Referring to the constitutional analysis discussed in 13 *Ohio State Law Journal*, 237 (Spring 1952), what is the public interest in the month of October, in the year 1957? The non-veteran petitioners have lost property—their *RIGHT* to pursue their trade and vocation. Yet, the only public interest served is a derogatory one—because the Government of the people is continuing to lose its valuable experienced employees. The professed public purpose (rehabilitation of the veteran) weights so slightly in opposition to the invasion of the individual's rights that the Veterans' Preference Law can no longer have Court sanction. For how can it be said that this Law, in 1957, had a valid public purpose? A glance at the legislative history (House Report) reveals:

> "Your Committee feels that the Federal Government should set the pace and that this proposal is an essential part of the re-employment and rehabilitation program."
>
> 1944 Code Congressional Service, pp. 1153, 1154.

Petitioners again urge the Court to read from the deposition of Mr. Ross. Read how the Military had moved out to Bataan and Korea, leaving the civilians behind *under orders* to remain in Manila,—"and we had orders from

our Colonel to stay . . . in Manila" (Record, 33a-34a). The book, Santa Tomas, which is an exhibit in this case (Plaintiffs' Exhibit "G") tells, chapter by chapter, the story, not only of Mr. Ross, but of other "non-veterans." This book is in the Library of Congress. It is not fiction. Petitioners urge the individual members of this Court to place themselves in the position of Mr. Ross when he received his notification of personnel action—separation from Government employment—squarely and directly because he was not a veteran. Mr. Ross was 49 years of age, almost fifty. To support his family he tried selling roofing paint; to better his salesmanship he enrolled and completed the Dale Carnegie sales course; he worked part time at a shopping center at the opposite end of town from where he lived; he lost approximately $4,000.00 in nine months by not working at the Air Field (Record, 41a).

Petitioners submit that this is the result of a professed purpose of re-employment and rehabilitation. Mr. Ross' Citation Award for Meritorious Civilian Service (Plaintiff's Exhibit "H") and his Commendation for Meritorious Civilian Service (Plaintiffs' Exhibit "I") could not help his unemployment problem. Chrysler Airtemp refused to hire him because of his age (Record, 40a).

Yes, put yourself in the shoes of Charles A. Ross. A faithful civilian employee of the United States Government working at a trade (sheet metal worker) for over 16 years, when on the 28th day of October, 1957, you would no longer work for the Government. This would be your check-out (Record, 39a). You know that there are other employees on the same job with fewer years of service—Peter Newcomer, Robert Smith, Carmen Hill—and others, "and two of those boys actually never saw fighting at all. One was in the Army of Occupation in Germany and the other one never even left the United States" (Record, 39a-40a).

Could the Court, just for a moment, envision Mr. Ross explaining to his wife why he had lost his job at Wright Patterson Field? For although the Law is at times complex and technical, Petitioners submit that it is the Courts who must preserve justice and that when the legislature goes too far, it is the Courts that must, if our American way of life is to continue, strike down unlawful enactments. The Law is supposed to be logical. It should be fair and equitable, but could you expect Mrs. Ross to accept the loss of her husband's paycheck as a fair, logical, and equitable penalty because her husband was not a veteran? Mrs. Ross testified that she had heard nothing from her husband from December, 1941 until January, 1943—no official notification from the War Department or anyone as to whether he was alive, missing or dead (Record, 43a). Mrs. Ross testified:

> "you could see what he had endured himself. He had beautiful teeth before, and they were completely deteriorated. . . . We worked with that (hair) for quite awhile, because there was just no hair. It was too bad" (Record, 44a).

Petitioners submit that the Law is unconstitutional because it violates due process. Had the statute been less vague or had the statute provided suitable standards for ascertaining which "veterans" the absolute retention preference applied to, then perhaps the question would be different. Petitioners submit that the statute is vague (see the *Mitchell* decision, supra) in that it has no standard whatever for ascertaining who is a "full fledged soldier or sailor," and that the classification based upon this Law is therefore arbitrary, unreasonable, and void. Arbitrary discrimination is forbidden by the due process clause. *United Public Workers* v. *Mitchell,* 330 U. S. 75; *Wieman* v. *Updegraff,* 344 U. S. 183; *Slochower* v. *Board of Education,* 350 U. S. 551. These decisions establish as modern law

the statement of Justice Bradley, dissenting in *Ex parte Curtis,* 106 U. S. 371, 376:

> "I do not believe that Congress has any right to impose such a condition on any citizen of the United States. The offices of the Government do not belong to the legislative department, to dispose of on any conditions it may choose to impose. The Legislature creates most of the offices, it is true, and provides compensation for the discharge of their duties, but that is its duty to do, in order to establish a complete organization of the functions of Government. When established, the offices are or ought to be open to all. They belong to the United States and not to Congress, and every citizen, having the proper qualifications, has the right to accept office and be a candidate therefor. This is a fundamental right of which the Legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights."

Also, there must be a rational connection between the statute and its objects. *American Communications Association* v. *Douds,* 339 U. S. 382, 404.

As we have heretofore pointed out, the re-employment and rehabilitation program is hardly to be considered as a valid reason for infringing the non-veterans' individual rights fifteen years after the war has ended.

In his famous Gettysburg Address in 1863, Lincoln recited from the Declaration of Independence:

> "Fourscore and seven years ago our Fathers brought forth upon this Continent a new Nation, conceived in Liberty, and dedicated to the proposition that all men are created equal."

Such philosophy, inherent throughout our Constitution and the Bill of Rights should not be meaningless in this day of cold wars among nations. To permit the discrimina-

tion that results from the *application* of the Veterans Preference Law in Federal Government today is to overlook a very basic premise. Dean Frank R. Strong, Ohio State University in his "American Constitutional Law," at page 40, under "Fundamental Law," quotes from Trueblood, The Predicament of Modern Man:

> "Because every man, whatever his color, his knowledge, his station, or his financial standing, is a Child of God, there is a profound level at which men are equal."

and on page 51, quoting from Mott, Due Process of Law:

> "Due process of law in this light appears to be a catch-all phrase for human rights rather than a phrase with a well defined content. Nevertheless, its ambiguity must not be taken to prove that the colonists did not consider that it limited the legislative bodies as well as the executive or judiciary. The evidence on this matter is clearly all on one side."

Just as this Court found in the *Brown* decision, that the negro was entitled to equal rights to attend the same schools as white children—in order to obtain *equal opportunity* for education, so must the non-veteran have equal rights to continue his employment for the Federal Government, indeed, to continue his trade, to pursue his lawful calling—in order to preserve *equal opportunity* for employment.

A very interesting discussion of veterans' preferences may be found in a decision of the High Court of Australia, given in Sydney, Australia, on April 16, 1959. The Court, being constituted by a Full Bench of all the Justices, overruled a demurrer in an action contesting the validity of a veterans preference law, the Re-establishment and Employment Act 1945-1952, as amended. The case is *The Illawarra District County Council* v. *Wickham and another*,

101 Commonwealth Law Reports 467. This case is interesting not only from the standpoint that the law was deemed to have outlived its validity, but also from the viewpoint that provision was made in the act for registration of individuals who considered themselves entitled to preference by reason of their service performed in relation to the War (Section 32 of the Act). Justice Taylor commented on this section, as follows:

> "By s. 32 it is provided that where any person not otherwise entitled to the benefits of this Division considers that, having regard to the service performed by him in relation to the war, he is entitled to receive the benefits of this Division, he may apply to the Central Preference Board for registration and if the board to which the application is made considers that the person is so entitled the board shall, . . . register him accordingly. It will be seen, therefore, that the expression 'person entitled to preference' includes at least three distinct categories of persons. It includes members of the community who had served in the Forces during the recent war, members of the community who had served in the specified manned during the first world war, and, finally, other persons who had performed service 'in relation to the war.'"

It is noteworthy, therefore, that the Australian Parliament did not discriminate against civilians who had performed services in relation to the war, even though they may not have been in the uniformed service.

It is further noteworthy that this High Court struck down the law, on the merits. Chief Justice Dixon stated:

> "The conduct of the war itself may supply additional constitutional reasons why such a law is within the defence power. But the obvious constitutional justification for laws providing for a general preference for exservicemen is found in the expected or actual con-

clusion of hostilities. For it lies in the necessity of fully re-establishing discharged servicemen in civil life and restoring them to their due place in a community which, the war being over, must itself undergo all the processes of re-organization that the resumption of conditions of peace may demand. The considerations are evident enough which make it proper to regard measures for such purposes as consequential upon the war and as within the defence power. As time advances, however, the force of the application of these considerations to the situation as it exists must diminish and the connexion with the defence power must become less and less direct and in the end become insufficient to support the law. A provision dealing with men suffering from defined disabilities stands on a different footing: so may laws dealing with other specific aspects of past war service. But here the question concerns a completely general law covering almost every kind of service. During the war in or in connexion with the armed forces, a general law *derogating from the civil rights of all others* in reference to employment and from the rights of employers, and the question is whether an extension of such a law into the thirteenth year after the cessation of hostilities can be sustained as an exercise of the defence power. For the reasons so fully set out in the judgments of Fullager and Windeyer JJ. I think that it has become impossible to sustain it. I am of opinion that the general operation of secs. 27 and 28 could not validly be extended by Act No. 56 of 1955 into the year 1958 and therefore could not apply to the present case." (Emphasis supplied.)

The war powers do not remove constitutional limitations safeguarding essential liberties. *Bowles* v. *Willingham*, 321 U. S. 503, 521.

Petitioners contend, therefore, in addition to the arguments heretofore given, that the statute in question has outlived any semblance of validity. The professed public purpose has withered away with time. Superimpose upon

this the realization that the seventeen years since the passage of the Veterans Preference Act have not been idle years, but on the contrary, have witnessed the greatest advancement of the proponents of basic civil rights this Nation has ever seen. Whittle away on our basic civil rights and the cause of Communism is enhanced. J. Edgar Hoover, Chief of the Federal Bureau of Investigation, stated recently:

> "Under communist domination in America, the first campaign of liquidation would engulf the lawyers, champions of due process of law. . . ." (U. S. Dept. of Justice, Fed. Bur. Invest., Mar. 1, 1960).

Finally, counsel for appellants would be remiss if it were not pointed out that appellants here are loyal American citizens; they are not persons under scrutiny as possible security risks (see the *Updegraff* case, supra, where the High Court struck down an Oklahoma "loyalty oath" statute because it required dismissal of teachers who had been members of "subversive" organizations regardless of their knowledge of the organization), nor are the appellants herein in the tenuous position of having refused to testify under the self incrimination provisions of the Fifth Amendment, nor are they Chinese laundrymen (constitutional protection afforded under Doctrine of *Yick Wo* v. *Hopkins*, 118 U. S. 356). In other words, if it please the Court, both the law *and* the equities are in favor of appellants.

QUESTION 3.

DOES THE CONTROL OVER REMOVALS FRIM OFFICE OF FEDERAL EMPLOYEES EXERTED BY OPERATION OF THE VETERANS PREFERENCE LAW VIOLATE THE DOCTRINE OF SEPARATION OF POWERS?

Petitioners respectfully refer to the dissenting opinion of Judge Prettyman in the *White* decision, supra, wherein

the basic authorities are discussed and logical reasons set forth as to why the Veterans Preference Law is a legislative infringement upon the executive department of the Government. Petitioners contend that the *White* decision is ample authority to demonstrate the diversity of judicial opinion on the constitutionality of the Veterans Preference Law. And, accordingly, upon this basis alone, even if none other existed, the District Court should have convened a Three-Judge District Court for the purpose of considering this challenge to the constitutionality of the Veterans Preference Law.

The cases of *Myers* v. *United States*, 272 U. S. 52 (1926) and *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935) set forth the historical, legislative and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered.

And the Government's argument of executive acquiescence is also disposed of by the *Myers'* decision. At page 172, the Court stated:

> "There are other later acts pointed out in which, doubtless, the inconsistency with the independent power of the President to remove is clearer, but these cannot be said really to have received the acquiescence of the executive branch of the Government. Whenever there has been a real issue in respect of the question of Presidential removals, the attitude of the Executive in Congressional message has been clear and positive against the validity of such legislation. The language of Mr. Cleveland in 1886, . . . was quite as pronounced as that of General Jackson in a similar controversy in 1835. Mr. Wilson in 1920 and Mr. Coolidge in 1924 were quite as all-embracing in their views of the power of removal as General Grant in 1869, and as Mr. Madison and Mr. John Adams in 1789."

As stated by Judge Prettyman, in his dissent in the *White* decision:

> "I would hope the Supreme Court will take this case, which lies in the 'field of doubt' it forecast in the *Humphrey's* opinion. Dire results are predicted to us if the present peremptory proviso gradually causes the civilian service of the Government to be manned by veterans of substantially less qualifications than experienced non-veterans."

And one of the cases relied upon by the majority in the *White* decision is, in the opinion of counsel for petitioners, a tragic example of what happens when the legislative branch exceeds its control over the executive branch of our Government. See *Reynolds* v. *Lovett*, 201 Fed. 2d 181 (1952). There Judge Prettyman concluded:

> "We think that Appellees' view that when personnel is reduced the Head of an agency may select employees to be retained in any classification *on the basis of* individual *merit* and without giving effect to Section 12 of the Veterans' Preference Act is erroneous." (Emphasis supplied.)

Accordingly, when department heads (including President Kennedy) in the *executive* branch of the Government make an independent determination in the interest of merit and efficiency in the Government service, they are not free to carry out that determination; rather, they are subject to the *mandatory* control of the Veterans' Preference Act.

Petitioners submit that this clearly in derogation of the merit system originally established in Federal employment and clearly infringes upon the separation of powers doctrine.

QUESTION 4.

IS THE VETERANS PREFERENCE ACT OF 1944 EX POST FACTO AND IN VIOLATION OF ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION OF THE UNITED STATES?

It is evident from reading the complaint that virtually all of the Plaintiffs have been employed by the Government since 1940 or 1941 (App. 4a-8a). The Law in question was enacted on June 27, 1944. No savings clause was attached thereto, to the effect that all career Government employees employed prior to the date of enactment should be considered in a separate category as to which the Veterans Preference Law should not apply for retention purposes. On the contrary, the non-veteran who was employed in 1929, or 1932, or 1936, as well as those employed in 1940 or 1941 can be ousted from his job by a serviceman serving during the time of the Korean conflict in 1952.

Article I, Section 9, Clause 3 of the Federal Constitution provides:

> "No Bill of Attainer or ex post facto Law shall be passed."

This is carried over in the Ohio Constitution in Article VIII, Section 16. Although it is commonly thought that ex post facto laws apply to criminal matters only, the truth of the situation is that ex post facto laws are illegal, if they invoke a penalty retroactively. See the case of *Preston* v. *Aron-Drex Realty, Inc.*, 106 Fed. Supp. 690 (D. C. Pa. 1952), wherein it was held that 38 U. S. C., Section 694(c)-1, providing for triple damages in the sale of property to a veteran for more than the property is worth, was held to be ex post facto, if construed to apply to sales committed before its passage. The law in this case, it is true, provided for penal damages—but it was not a criminal statute. In

United States v. *Lovett*, 328 U. S. 303, the Supreme Court of the United States held that, at page 316:

> "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, 18 U. S. C. A., Section 2, 7 F. C. A., title 18, Section 2."

Although the Government may contend that Veterans Preference has been in effect for many years, it was not until 1944 when this Law was passed that non-veterans were categorized in a separate class from the veterans. Especially was this so for retention purposes. See the testimony of Personnel Chief Rose:

> "Beginning in 1944 WD Form No. 50 and currently SF Form 50, there is an item providing for noting non-veteran or veteran.". . . "In your experience as a personnel officer, when did you first use such a form specifically indicating a veterans' preference as opposed to the simple question, 'Have you served in the Military Service?'
>
> Answer: "I believe this was following the passage of the Veterans Preference Law in 1944.". . .
>
> "Q. Mr. Rose, you did have knowledge of the Veterans Preference Law in this other job, and you know when these forms with the specific reference, 'Veterans Preference' were used?
>
> "A. That's right.
>
> "Q. And it was after the passage of the Veterans Preference Law in 1944?
>
> "A. Right."

The 1944 Law was the first Law to inflict this punishment as we know it today, and, accordingly, it is unconstitutional as being ex post facto. Petitioners contend that not only is it illegal, but it is extremely demoralizing to have gone

to work for the Federal Government in the 1930's or early '40's with an eye to possible retirement under the Civil Service system after completion of the minimum required years, only to have the Congress enact in 1944 a Law which prevents them from continuing in the Federal Service, should a reduction-in-force separate them from the rolls. Many of Petitioners have over fifteen years of service and are looking forward to retirement. They have been, with tongue in cheek, promised a retirement program after completion of twenty years of satisfactory service. Legally, they were so advised *prior to 1944*. Accordingly, not only is the 1944 Act ex post facto in that it inflicts a penalty retroactively, but it is an unlawful restriction upon the retirement system and the rights acquired thereunder by the non-veteran employees employed prior to the passage of the Act.

Petitioners do not contend that an individual has an absolute right to work for his Government, but petitioners do contend that the non-veteran employee already in the Government service must be given his equal opportunity to retain his employment and the benefits to be achieved therefrom, including his bi-weekly wage and his possible retirement annuity. To some extent this argument falls into the first argument of due process; but, on the other hand, it is the retroactive aspect of the 1944 Law—the fact that the personnel technicians must have a new form filled out indicating veterans preference of employees already on the Government's rolls and thereafter make up retention registers showing all non-veterans in the same subgroup (regardless of whether they were employed prior to June of 1944, or afterwards)--it is this retroactive aspect of suddenly being placed in a non-preference subgroup after already performing years of satisfactory service—it is this aspect of being placed in a category of "second class citizens," by a law enacted years after the employee first

commenced his federal employment—it is this penalty; it is this demoralizing change of circumstances caused by a new law—that petitioners contend requires a ruling of unconstitutionality as applied at least, to those non-veterans employed by the Government prior to June, 1944.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM R. COEN,
WHITE, ZIMMERMAN & COEN,
[illegible],
Dayton 2, Ohio,
Counsel for Petitioners.

August 8, 1961.

Order Denying Rehearing

JUDGMENT

February 10, 1961

This cause has been heard and considered upon oral arguments, briefs of counsel, and upon the record;

And it appearing that the order of dismissal of the District Court, upon authority of *Wesley D. White, et al.*, v. *Thomas S. Gates, Jr., Secretary of the Navy, et al.*, 253 F. 2d, 868, certiorari denied, 356 U. S. 973, was a proper disposition of the case;

The judgment of the District Court is affirmed, and it is so ordered.

ENTER:

/s/ Marion S. Boyd,
United States District Judge.

ORDER DENYING REHEARING

April 13, 1961

The petition of the appellants for rehearing has been duly considered by the Court and is found to be without merit..

Accordingly, it is denied.

Approved for entry:

/s/ Marion S. Boyd,
United States District Judge.

COMPARISON CHART

Mr. Daryl George (veteran)	*Mr. Charles A. Ross (non-veteran)*
In Military Service from March 16, 1944, to March 25, 1944.	Separated from home and family. Mode of life seriously disrupted. Could not be expected to resume his regular activities without re-employment and rehabilitation aids. The war situation was tense—Japanese fleet lying out off the coast. Repaired combat aircraft—repaired wings and patched fuselage—repaired gun mounts where a 20 millimeter shell had hit. Forty-five miles from the combat area. Twenty-four hour alert. Working in blackout and through the daytime. Constantly under bombardment. Scratch or a piece of shrapnel hit me on the ankle. We hit the ditches. We helped to put out the fires. I manned one of the machine guns to help a sergeant fight strafers that were coming in ahead of the bombers. During bombardment, continued job at the rate of 24 hours a day. We used a sheet metal shop, which was set up in a home. We made wing tanks—so what planes we did have could still be maintained in operation, in flight. We used Quezon Boulevard for a runway, for fighter planes taking on and off. No longer in a protected American reservation. Guarded the last plane and helped lieutenant take the plane off from Manila.

Mr. Daryl George (veteran)

Mr. Charles A. Ross (non-veteran)

Combat zone now 30 miles from Manila but Japanese soldiers within five to ten miles of the city—they were moving in.
U. S. Military had all moved out to Bataan. . . .
Still doing our jobs.
Taken prisoner January 2, 1942.
Armed Japanese soldiers—lucky the Captain could speak English—he was American born.
Fixed up emergency kits of food and bedding.
Processed, searched and taken to Santa Tomas Internment Camp.
Physical condition excellent; weight, 168.
Treatment from Japanese was rough.
Quite a few never came back from Fort Santiago—the old Spanish prison.
Some were beaten with their saber chains—some were hit across the side of the face with the flat part of their sword.
Tough all the way around for everybody (Feb., 1944).
Standing out at nights for roll call while Japanese tried to locate missing individuals (who had died that day and were buried).
American forces used interment camp as headquarters.
Mortar shells and artillery hitting us.
Physical condition; 100 pounds, teeth loose, no hair.
Mr. Ross had destroyed government property in the face of enemy fire (so it could not be captured).
His wife heard NOTHING from December 1941 to January 1943, as to whether he was alive or dead.
Mr. Ross later received a civilian meritorious service award.

(Record 29a-42a)

Comparison Chart

EXCERPTS FROM STIPULATION AND AFFIDAVITS IN WHITE v. GATES, 287 F. 2d 884

The following stipulation of facts was entered in the *White* decision:

"STIPULATION OF FACTS

"It is hereby stipulated and agreed that:

"Due to a reduction in the scheduled workload at the Charleston Naval Shipyard, reduction in force notices were issued to approximately 500 Shipyard employees during the month of April 1956. Due to an unforeseen increase in the workload, most of the outstanding reduction in force notices were *cancelled* on May 17, 1956.

"Wesley D. White, employed at this Shipyard as a Pipefitter, Pay No. 56-13735, *has not been issued a reduction in force notice* and there is no indication he will be issued a reduction in force notice." (Emphasis supplied.)

Furthermore, counsel for the government in the *White* case filed several affidavits to the effect that the Plaintiffs in the District of Columbia case were still on the job; for example,

"Due to an unexpected increase in the workload Wright's *notice of a reduction in force was cancelled* on 16 May 1956." (Emphasis supplied.)

"On 1 March 1956, George R. Phillips was offered and accepted a change to lower grade . . . *in lieu of reduction in force.*" (Emphasis supplied.)

"On 16 May 1956, due to an unexpected increase in workload, Mr. Bluerock's notice of separation due to reduction in force was cancelled."

"On April 3, 1956, Mr. Hammond was issued a notice of separation because of reduction in force, his last day of work to be 11 May 1956 and his date of separation to be effective on 2 July 1956. . . . Due to retire-

ment of another Leadingman Welder (Electric) Hammond's reduction in force notice was cancelled on 17 April 1956."

"On 16 May 1956, due to an unexpected increase in the workload, Williams' notice of reduction in force was cancelled."

These affidavits were attached to the government's motion for summary judgment and appear at pages 22-27 of the Joint Appendix in the *White* case.

EXECUTIVE ORDERS (Pertinent text thereof)

1. Executive Order No. 8561, October 4, 1940: Volume 3 (Classification and selection) of regulations governing the administration of the Selective Service Act prescribed—5 Federal Register 3923 (October 8, 1940). These regulations defined a "necessary man." The local draft board determined who was a "necessary man."

2. Executive Order No. 9309, March 6, 1943, 8 Federal Register 2911 (Wednesday, March 10, 1943). This Order controlled government requests for the Selective Service deferment of Federal Employees.

I, subparapraph 1 provided:

> "No agency shall request the selective service deferment of any employee on occupational grounds except in accordance with the provisions of this Order. No employee shall initiate a request for his own deferment on occupational grounds or advocate the making of such a request on his own behalf."
>
> * * * * *
>
> "IV. Requests for Deferment
>
> * * * * *
>
> "3. In preparing the prescribed selective service form for submitting a request for occupational deferment to the local selective service board, the Agency Committee shall enter on such form the words 'Government Request,' and shall also indicate thereon the name of the agency and the subordinate part thereof in which the registrant is employed.
>
> "4. In any case in which a Government request for deferment is denied by a local selective service board, the Agency Committee concerned shall at once file an appeal from such action. The appeal *shall stay the induction* of the employee affected until final decision in the case." (Emphasis supplied.)
>
> "V. Voluntary Entrance Into Armed Forces

Executive Orders (Pertinent text thereof)

"1. Unless an Agency Committee has requested or would request deferment of an employee under this Order, the agency, upon his request, shall grant him a release to enter the armed forces voluntarily in a commissioned or enlisted status.

"2. If an Agency Committee has requested or would request deferment of an employee under this Order, the agency *shall deny him such a release* unless it is determined that:

"a. The employee is likely to be assigned to active combat service; *or*

"b. The employee's skills and ability probably will be utilized equally or more effectively in the armed forces." (Emphasis supplied.)

EDITORIAL

The following editorial by the editor of the Dayton Journal Herald on Tuesday, February 14, 1961, shortly after the decision of the Court of Appeals, is quoted:

"MERIT SYSTEM MOCKED

"The forlorn fight of half a dozen Wright-Patterson base employes to declare the Veterans Preference Act unconstitutional has lost another major round and the injustice done in the name of rewarding those who once wore the uniform goes on.

"At the base there were long-term employes who were too young to retire, too old to get other jobs without great difficulty, who lost out in the personnel shift of last year to far younger men who had seen some kind of service. Some of the losers were never in uniform because their government declared that their best service during World War II could be right there at Wright-Patterson as civilians. Some of the winners wore the uniform on the very same post.

"Perhaps there's reason for giving a returning veteran a leg up for any job vacancy at war's end, though some of us didn't see the need of it at the time, but this business of giving him a lifetime advantage over the next fellow is wrong. It mocks the very principle of a merit system."

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In the Supreme Court of the United States

OCTOBER TERM, 1961

HYLAND ET AL., PETITIONERS

v.

WATSON ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order of the United States District Court for the Southern District of Ohio (R. 48a) is unreported. The *per curiam* order of the Court of Appeals (Pet. App. 1a) is reported at 287 F. 2d 884. The order of the Court of Appeals denying rehearing (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 1961. A timely petition for rehearing was denied on April 13, 1961. The time for filing a

petition for a writ of certiorari was extended by a Justice of this Court to August 10, 1961, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a contention that the Veterans Preference Act is unconstitutional, because it allegedly violates the Fifth Amendment, the doctrine of separation of powers and the prohibition against *ex post facto* laws presents a substantial question warranting the convening of a three-judge court.

STATUTE INVOLVED

Section 12 of the Veterans Preference Act of June 27, 1944, c. 287, 58 Stat. 390, 5 U.S.C. 861, provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings * * *.

STATEMENT

This action by six non-veteran employees of the Department of the Air Force at Wright-Patterson Air Force Base, Ohio, and an association of federal employees, was brought against respondents [1] to enjoin the operation of the Veterans Preference Act, 5 U.S.C. 861, on the ground of its unconstitutionality (R. 2a-13a). Application was made by the petitioners for the convening of a three-judge court, pursuant to 28 U.S.C. 2282, 2284 (R. 13a-14a).

The complaint alleged that four of the individual petitioners, Hyland, Schmidt, Ross, and Tomasko had more than fifteen years seniority as civil service career employees at the Base when, in October, 1957, they received "Reduction-in-Force" notices separating them from their employment (R. 4a-7a). The two remaining individual petitioners, McConnell and O'Brien, with more than sixteen years seniority on the job, received "Reduction-in-Force" notices during 1957, reducing them in grade and in pay (R. 6a-8a). It is further alleged that all of the petitioners have had efficiency rating of "satisfactory" or better, and that, except for the operation of the Veterans Preference Act, they would not have been separated or reduced in grade (R. 4a-8a).[2]

---

[1] Respondents Rawlings and Wray are generals in command at the base; respondents Watson and Rose are civilian personnel officers at the base (R. 3a-4a).

[2] The petitioner Federal Employees Equality Association joined in the complaint, also asserting the unconstitutionality of the Veterans Preference Act, although it does not specifically appear that any of its members, other than the six named petitioners, have been affected by the statute (R. 11a-12a).

The complaint also asserts that, in accordance with the regulations of the United States Civil Service Commission,[3] adopted pursuant to the Veterans Preference Act, the respondents have directed that non-veteran career employees, classified as Group I B under the regulations, be subordinated to veteran career employees, classified as Group I A, in reductions in force at the installation where they were employed (R. 9a). Such priority to former members of the armed services is accorded only to those with performance ratings of "good" or better. This preference, the complaint states, amounts to a deprivation of the right to employment without due process of law, is an arbitrary discrimination against non-veterans, and is *ex post facto*. Petitioners also argue that the Veterans Preference Act is void because it lacks reasonable standards for determining categories and that it violates the doctrine of separation of powers.

Following petitioners' application for the convening of a three judge district court, respondents moved to dismiss on the ground that the complaint failed to raise a substantial constitutional question and to state a claim upon which relief could be granted (R. 15a). The District Court agreed and granted the motion. The Court of Appeals affirmed. (Pet. App. 1a.)

ARGUMENT

Unless a complaint presents a substantial question concerning the constitutionality of a statute, there is, of course, no occasion for convening a three-judge dis-

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[3] Part 20, entitled "Retention Preference Regulations," 5 C.F.R., Cumulative Pocket Supplement for use during 1957.

trict court. When a complaint is filed purportedly attacking a statute on constitutional grounds and seeking to restrain its enforcement, the single district judge must first inquire into the merits. Then, only if the court finds the constitutional issues substantial, may a three-judge court be convened. *Ex parte Poresky*, 290 U.S. 30; *Water Service Co.* v. *Redding*, 304 U.S. 252. In the instant case, the courts below were plainly correct in holding that the constitutional issues are insubstantial.

1. Preference for veterans in federal employment has an extensive history, dating back to the administration of President Lincoln. See the Act of March 3, 1865, 13 Stat. 571, which granted employment preference to disabled veterans. Later, in 1876, other veterans, their widows, and orphans were included, 19 Stat. 143, 169. Again, in the Act creating the modern civil service system, Congress reaffirmed the policy of awarding employment preference to veterans, Civil Service Act of 1883, § 7, 22 Stat. 403, 406. In 1912, the preference accorded former servicemen was extended, Act of August 23, 1912, § 4, 37 Stat. 360, 413. The Veterans Preference Act of 1944 is but the latest expression of the long and well established Congressional policy of granting preference in federal employment to those who served in the nation's armed forces.

This traditional policy of preferring veterans of equal or better efficiency has been repeatedly upheld by the courts. In *Gianatasio* v. *Kaplan et al.*, 257 N. Y. 531, 178 N.E. 782, the New York Court of Appeals sustained that state's veterans preference law against

the argument that it violated the equal protection clause of the Fourteenth Amendment. An appeal to this Court was taken, but was "dismissed for the want of a substantial federal question." See *Gianatasio* v. *Kaplan et al.*, 284 U.S. 595. That decision clearly controls the instant case.

Again, in *Hilton* v. *Sullivan*, 334 U.S. 323, this Court upheld the policy of granting priority to veterans. That case, like the instant one, involved the Veterans Preference Act of 1944. Although the attack was directed at the Civil Service Commission's authority under the statute to disregard length of service in granting veterans a preference over non-veterans, and not expressly directed to constitutional issues, the arguments made there were similar to those of the petitioners in the present case. The charge was that "[t]he failure of the Commission to consider relative length of service in establishing these retention priorities was * * * 'unreasonable, arbitrary, and capricious, without statutory warrant, and contrary to the express provisions' of applicable statutes." *Id.* at 327. This Court, however, upheld the validity of the regulations, pointing out that the merits of the policy was a question for the legislature: "Thus Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy." *Id.* at 339. Basically, the argument in the

present petition amounts to an attack on that policy. But as noted by this Court in *Hilton*, the wisdom of the policy is a matter for Congress.

White v. *Gates*, 253 F. 2d 868 (C.A. D.C.), certiorari denied, 356 U.S. 973, similarly sustained the granting of a priority to former members of the armed forces. There, as here, the Veterans Preference Act was attacked on constitutional grounds. The District of Columbia Circuit, like the court below, held that there was no substantial issue requiring a three-judge district court, stating (p. 869): "Veterans' preference in federal employment has been an established policy of Congress for many years. Encouragement and reward of military service are its rational basis. If it is unwise and costly, this does not make it unconstitutional. The Supreme Court and other courts have enforced it, and have done so without suggesting any possible constitutional difficulty." This Court denied review.

"The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *Water Service Co.* v. *Redding*, 304 U.S. 252, 255. The decisions to which we have alluded above make clear that the contentions advanced in this case were laid to rest long ago.

2. Although it seems unnecessary to go beyond the citation of authority, we point out briefly why we believe that petitioner's constitutional arguments are plainly without substance.

The contention that the Act violates the petitioners' "right to work" misconceives the nature of their rights. While Congress cannot adopt arbitrary and discriminatory standards for public employment, such as religious or racial criteria, there is otherwise no judicially enforceable right to federal employment. *United States* v. *Perkins,* 116 U.S. 483; *Crenshaw* v. *United States,* 134 U.S. 99; *Eberlein* v. *United States,* 257 U.S. 82. Certainly, Congress can establish standards for the selection and retention of employees as long as those standards have a reasonable basis.

Turning to the instant case, it is clear that giving veterans with satisfactory performance ratings a priority in federal employment cannot be attacked as an arbitrary discrimination. Whatever may be the wisdom of this policy, it has a rational basis. It rests on Congress' conclusion that able men who served the nation as members of the armed forces should be given special recognition for the public service they have performed. Whatever the pros and cons as to the social and economic desirability of the classifications, they are clearly not so unreasonable as to constitute a deprivation of due process. Nor is there any vagueness in the standards for determining who is eligible for preference. Those who have been members of the armed services are given priority over those who have not. There is no difficulty in determining who falls within the preferred categories.

Nor is there any merit to the argument that the Veterans Preference Act conflicts with the doctrine of separation of powers by infringing upon the Presi-

dent's right to control the appointment and removal of executive personnel. The Constitution (Article II, § 2, Cl. 2) expressly grants Congress the power to control the appointment of subordinate employees. This "implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed." *United States* v. *Perkins*, 116 U.S. 483, 485. See, also, *Myers* v. *United States*, 272 U.S. 52, 161.

Finally, petitioners' "*ex post facto*" challenge to the statute is entirely without substance. The Veterans Preference Act imposes no penalty or punishment upon the petitioners within the meaning of the *ex post facto* clause, Article I, § 9, Cl. 3. See *Calder* v. *Bull*, 3 Dall. 386. The purpose of the Act, moreover, is only to benefit former members of the military. If the incidental effect is to lessen the petitioners' job security, the short answer is that they never had a constitutionally protected right to federal employment. The logical result of petitioners' argument would be that the Government could never change seniority criteria, employment standards, etc., for such action would always affect personnel already employed by the Government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

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September, 1961.

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Petitioners,

v.

ROBERT M. WATSON, BERTRAM M. ROSE, GENERAL E. W. RAWLINGS, and BRIG. GEN. STANLEY T. WRAY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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November 29, 1961

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IN THE

Supreme Court of the United States

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---

PETITION FOR REHEARING

Pursuant to Rule 58 (2) of this Court, Petitioners respectfully pray for a rehearing of the Order of October 16, 1961, denying Petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. By timely order, Petitioners were granted to December 1, 1961, to file this petition for rehearing.

GROUNDS FOR REHEARING

The grounds for rehearing are that substantial intervening circumstances have occurred and that other substantial grounds not previously presented are now available to petitioners.

WHITE HOUSE CONFERENCE

Specifically, on October 27, 1961, certain of petitioners met at the White House with Mr. Lee C. White, Administrative Counsel to the President. Also present was a representative of the Civil Service Commission. A two hour discussion was held and further telephone conferences since. The Administration is interested in petitioners' attack on the President's announced policy of "Equal Job Opportunity" (without DISCRIMINATION). The anxiety of the Berlin situation makes it even more important that a new and nonarbitrary statute replace the current (1944) law.

Two and one half million civilian employees of the Government are affected by this case. It is highly deserving of suggestions from the White House and it is completely deserving of a hearing before this Court.

Perhaps even more important than the interest of the White House is the fact that an important ground exists for granting certiorari (which ground not heretofore presented).

THREE JUDGE COURTS—IMPROBABILITY OF CONFLICTING DECISIONS

In *Schriber* v. *Cleveland Trust Co.*, on rehearing, certiorari was granted; Mr. Justice Stone stated, at 305 U. S. 47, page 50:

> "We later granted certiorari, 304 U. S. 587, on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere

> *with a resulting conflict of decision* was *improbable* because of the concentration of the automobile industry in the Sixth Circuit." (Emphasis supplied.)

See also, *Federal Trade Commission* v. *Simplicity Pattern Co., Inc.*, 360 U. S. 57, 58:

> "We granted both petitions because of the fundamental significance of these issues in the application of an important Act of Congress.

The Court determination of veteran in the case of *Mitchell* v. *Cobra*, 333 U. S. 411, is not being applied in relation to another Act of Congress, the Veterans Preference Law. A *conflict* exists as to the *application* of an important Act of Congress. And there can be no doubt but that the Veterans Preference Act *was* an important Act of Congress. It's purpose of rehabilitation of the returning veteran is now questioned by this case. Any law directly affecting this many employees is important, its *continuance* ad infinitum [illegible] should be reviewed by this Court. NOW is the time to grant this review! A fair and just appraisal of this case requires more than the summary dismissal of petitioners' arguments, both on the merits AND on the PROCEDURE FOR APPEAL FROM A DENIAL OF A THREE JUDGE COURT.

The structure of the Three Judge Court system and appeal therefrom is a matter recently before this Court in District of Columbia matters, *Schneider* v. *Herter*, 283 F. 2d 368. This was a decision by J. Fahy, Acting Chief Judge wherein the Court did not pass on the proper means of review from the denial of a Three Judge Court. The Court said, (p. 370):

> "The ordinary method of correcting trial court error is by appeal under applicable statutory provisions; and when an extraordinary method is appropriate it is by application to an appellate court, either the Supreme

> Court or the Court of Appeals, I do not in the abstract decide which, for a writ."

The Court cited the Comment in 27 University of Chicago Law Review 555 (1960), entitled "The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism. The author stated, at page 546:

> "There are few, if any, cases of "vast public moment"; nor is any nationwide legislative policy being frustrated in the district courts."

The Comment then proceeds to state that the most far reaching three-judge decisions of the past decade have been those involving school segregation. The author then points out the problem of having a single district judge pass on what is now clearly a substantial Constitutional question:

> "The courts have been in disagreement as to whether the segregation issue raises a sufficiently 'substantial and unsettled' constitutional question to bring it within the Three-Judge Acts."

And in footnote 49 (p. 566):

> "The Supreme Court has continued to avoid settling the question either way."

The reason for the foregoing discussion of the unusual appeal from denial of Three-Judge Courts is to point out the IMPORTANCE of granting certiorari in this case. It is all important that this Court spell out what the proper review is—both from a procedural standpoint as well as on the merits. Should a DISTRICT JUDGE sitting in Dayton, Ohio, citing another dismissal for lack of a substantial constitutional question in the DISTRICT OF COLUMBIA MAY FINALLY determine petitioners' rights? The EFFECT of the decision of Judge Weinman was to bring to an effective appeal of his decision to date.

Petitioners claim that their attack on the constitutionality of a federal statute has been determined on the MERITS by District Judge Weinman. Is this a matter for a Writ of Mandamus to order the convening of a three-judge court? [illegible] appealed the decision of Judge Weinman to the Ninth Circuit and that Court too chose to follow a District Court decision (*White v. Wirtz*, 252 F. 2d 868) denying petitioners their right to a three-judge court. It appears that by this Court denying certiorari that [illegible] district judge determines what is a substantial question of law that now been [illegible].

> [illegible] claim "obviously without merit," [illegible] Supreme Court by previous decisions [illegible] of the subject, or
>
> [illegible] the question previously been raised and settled in any other case, no matter how weak the case may be, even though the Supreme Court did not review the case.

[illegible] contend this is not the intent nor the [illegible] of Judge Statute. Petitioners contend further that the District Court did not find petitioners' claims to be "obviously without merit." If there is any doubt [illegible] petitioners invite an inquiry be made to Judge Weinman. Rather, petitioners are confident that Judge Weinman [illegible] decision [illegible] "obviously without merit").

[illegible] this Petition for [illegible] Judge [illegible] the Supreme Court, [illegible] matter [illegible] Judge [illegible] District Judge [illegible] to the Higher Court [illegible] Motion [illegible] of Judge [illegible]

White matter. And such an ending to this case is not to the best interest of the federal service nor is it a solution to the problems besetting litigants attacking a federal statute as being unconstitutional. For when, if ever, will any more conflict arise than we have at the present time? Circuit Judge Prettyman stated at page 870 of the *White* decision:

> "I think a substantial constitutional question is raised. I would remand for consideration by a statutory Three-Judge District Court." *White* v. *Gates*, 253 F. 2d 868, 870.

In view of the problems of ever reversing a trial judge upon his refusal to grant a three judge court and in view of the merits of this case, petitioners believe that it is incumbent upon this Court to hear this matter. How else can a litigant pursue his right to a three judge court? The purpose of the statute was not to make it impossible to obtain a three judge court; the end result, however, if certiorari is not granted in his case, will be that the long standing rule of law that a denial of certiorari is not a ruling on the merits will be obviated and reduced to nothing.

CONCLUSION

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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November 29, 1961

CERTIFICATE OF COUNSEL

I, WILLIAM R. COEN, counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

s/ WILLIAM R. COEN,
WILLIAM R. COEN,
Counsel for Petitioners.